APPEAL NO. 010043

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on November 28, 2000. Although the record indicates that there were three issues presented for resolution, the hearing officer only decided two issues dealing with supplemental income benefits (SIBs) for the first and second compensable quarters. In that neither side has appealed that omission, we need not address it further. The hearing officer found that the appellant (claimant) was not entitled to SIBs for the first and second quarters because she had not met the requirements of a good faith job search and her unemployment was not a direct result of her impairment.

The claimant appealed, contending that her treating doctor had said that she had "no ability to work." The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

Although there are neither stipulations nor fact finding of a compensable injury, the evidence and testimony of the parties established a compensable head and cervical spine injury on _____. The parties stipulated that the claimant had a 23% impairment rating (IR), that impairment income benefits (IIBs) were not commuted, and that the qualifying period for the first quarter began on March 31, 2000, with the qualifying period for the second quarter ending on September 28, 2000. The claimant proceeds on a total inability to work basis.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). Rule 130.102(b) provides that an injured employee who has an IR of 15% or greater, and who has not commuted any IIBs, is eligible to receive SIBs if, during the qualifying period, the employee: (1) has earned less than 80% of the employee's average weekly wage as a direct result of the impairment from the compensable injury; and (2) has made a good faith effort to obtain employment commensurate with the employee's ability to work.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. Although we have repeatedly suggested that the hearing officer make findings on all three elements of Rule 130.102(d)(4), the hearing officer in this case does not even reference the rule, much less make findings on the elements.

The hearing officer did find that the claimant could "work at least four hours per day in a sedentary job" which would indicate that the first element of Rule 130.102(d)(4) was not met. Although Dr. Se, the claimant's treating doctor, in reports dated May 24, 2000, and March 17, 1999, states that the claimant "is deemed to be totally disabled from any and all work" and she will not "be able to return to the work force in any capacity" he does not provide a narrative which specifically explains how that is so. In a report dated July 5, 2000, Dr. Se recognizes that the claimant "has concomitant medical issues" but believes the claimant's "underlying spinal disease" precludes her "from returning to a full time position." As to the third element, both Dr. C, an independent medical examination doctor, and Dr. Si, a carrier-selected required medical examination doctor, are of the opinion that the claimant's physical problems do not prevent the claimant from returning to work but her clinical depression (apparently not part of her compensable injury) may preclude "gainful employment." In a report dated October 11, 2000, Dr. Si writes:

> I think the major reason why this patient cannot return either to her previous employment or particularly to any type of employment is based upon her psychiatric illness predominantly with the physical problems being considered secondary and of considerably lower priority. From her description her previous job was relatively sedentary and I believe if she were not ill from a psychiatric standpoint she could return to that employment.

These reports provide both evidence regarding the third element of Rule 130.102(d)(4) and give support to the hearing officer's determination that the claimant's unemployment "is a result of other conditions and not a direct result of Claimant's impairment from the compensable injury."

The MRI, excluded because of lack of timely exchange, would not have resulted in the rendition of a different judgment. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Philip F. O'Neill
Appeals Judge